materials to satisfy itself about the inefficiency and the authority applied its mind to those and had objective satisfaction in taking drastic action as has been done by Annexure 'B'.

24. Considering the facts and circumstances of the case and in absence of any materials whatsoever supporting the allegation of inefficiency we are constrained to hold that Annexure 'B' is malafide and done in colourable exercise of duty and it is an abuse of Rule 150 sub-rule 1 of the Bangladesh Water Development Board (Employees) Service Rules, 1982 and, as such, it is liable to be declared as having been done without lawful authority.

Accordingly, the Rule is made absolute with cost and the order of termination Annexure 'B' under Memo No. ৪২০-পাভিবো(সচি) প্রশাসন ৩/২ পি ৩১৭/৭৮ dated 28-8-94 is hereby declared as having been passed without any lawful authority and is of no legal effect. We assess the cost of 5 gold mohor only.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

AK Badrul Huq J

Judgment
November 23rd, 1997

Abdul Kader Rari and others.....Petitioners
vs
Kaiser Ahmed Howlader and others.....Opposite Parties*

Specific Relief Act (I of 1877)
Section 43
Evidence Act (I of 1872)
Sections 17 and 21

Since the plaintiffs claim their title through the defendant No. 11, the decree passed in Title Suit No. 30 of 1960 and the subsequent compromise decree passed in Title Suit No. 212 of 1979 where the defendant No. 11 admitted right, title and possession of the defendant No. 2 are binding upon the present plaintiffs on the strength of the application of section 43 of the Specific Relief Act and the Courts below have rightly found that admission made by the defendant No. 11 is also binding upon the plaintiffs. .....(17)

Begum Khodeza Akhter vs Hajera Khatun and others, 37 DLR (AD) 212 ref.

Words and Phrases

Benami—The word "Benami" is of Persian origin made of two words "be" and "nam" meaning "no name" that is nameless or fictitious. The nominal owner is the "Benamidar". The simple meaning of "Benami" is that a purchaser desires to buy property but does not desire to buy in his own name and therefore buys it in the name of someone else. A benami transaction has been described shortly as one in which the real owner of property allows it to appear in the name of an ostensible owner under a sort of secret trust.
.....(19-20)

Land Reforms Ordinance (X of 1984)
Section 5
Trusts Act (II of 1882)
Section 82

The practice of "Benami transaction" received legislative recognition in 1882 when section 82 of the Trusts Act gave statutory recognition to "Benami transaction" which enshrines the fundamental proposition that a benamdar holds the property for the benefit of the real owner. Subsequently, by the Land Reforms Ordinance, 1984 the concept of "Benami transaction" had been abolished since January 26, 1984 when the said Ordinance was published in the Bangladesh Gazette, Extraordinary and then on none is allowed to set up the claim of benami transaction.
...(20-21)

Gopeskrist Gosair vs Gunga Persaud Gosain, 6 MIA 53 ref

* Civil Revision No.2915 of 1991 (Dhaka)
Civil Revision No. 30 of 1989 (Barisal)

Code of Civil Procedure (V of 1908)
Section 115

The contention that the benami transaction so far the Government land is concerned was devised to defraud the Government and its purpose appears to be illegal and such plea must fail having not been pleaded in the plaint nor raised before the trial Court and also the appellate Court, the High Court Division in exercising of power under section 115 of the Code cannot entertain the same.
.....(24)

Nurjahan Begum vs Mahmudur Rahman Mullick, 34 DLR (AD) 61 ref.

Bengal Tenancy Act (VIII of 1885)
Section 103B
State Acquisition & Tenancy Act (XXVIII of 1951)
Section 19

Although RS and SA record of right were prepared in the name of the defendant No. 11 when plaintiffs claim title through him but no presumption is attached to the SA record of right when RS record of right got a presumption under section 103B of the Bengal Tenancy Act but that presumption is also a rebuttable one and the defendant No. 1 successfully rebutted the same by producing a good number of rent receipts showing the payment of rents to the Government but the plaintiffs could not file a single rent receipt although, rent receipts cannot be said to be evidence of title but the same can be held to be evidence of possession and possession always follows from lawful title. .....(27)

Erfan Ali vs Joynal Abedin Mia and others, 35 DLR (AD) 216 ref.

Code of Civil Procedure (V of 1908)
Section 115

The judgments under challenge are not based on misreading of evidence or it was founded on misinterpretation of laws or otherwise contrary to the weight of evidence on record and it cannot be said to have been suffered from perversity and that the finding of fact based on evidence and other materials on record cannot be disturbed by the High Court Division and the same is binding upon it. .....(29-30)

Durga Chowdhurain vs Jawahir Singh Choudhuri, 17 Indian Appeal 122; Fakaruddin Mia and another vs Mohammad Khoda Baksh Sheikh, 29 DLR (SC) 268; Akrab Ali vs Zahiruddin, 30 DLR (SC) 81; Abdul Matin Choudhury vs Chapala Rani Sen and others, 37 DLR (AD) 205; Naimuddin Sardar vs Md Abdul Kalam, 41 DLR (AD) 3; Jasimuddin Kanchan vs Ali Ashraf, 42 DLR (AD) 289; Mazhurul Borhan vs AH Bhuiyan, 15 BLD (AD) 237 and Haider Unnessa and another vs Monwara Begum and others 16 BLD (AD) 280 rel.

Abdul Quayum with Mokbul Hossain and Shawpan Kumar Dutta, Advocate s— For the Petitioners.

M Shamsul Alam with Roushan Ara Begum and Mohammad Ullah, Advocates—For the Opposite Parties.

Judgment

By this application under section 115 of the Code of Civil Procedure, the concurrent decisions of the courts below have been called in question by the plaintiff-petitioners whereupon a Rule was issued upon the opposite party Nos. 1-9 to show cause as to why the impugned judgment and decree dated 31-12-1988 passed by the District Judge, Bhola in Title Appeal No. 11 of 1985 should not be set aside.

2. Facts leading to the issuances of this Rule may be summarised as follows:

The petitioners as plaintiffs instituted a suit being Title Suit No.261 of 1980 in the Second Court of Subordinate Judge at Barisal for declaration of their title on the Suit land described in schedule-'Ka' to the plaint and also for further declaration that the documents described in schedule-'Ka' and 'Ga' are illegal, void, collusive and not binding upon the plaintiffs. The suit, thereafter, on transfer to the Court of Subordinate Judge at Bhola was renumbered as Title Suit No.164 of 1981.

3. The genesis of the plaintiff's case is that the defendant No.11 obtained settlement of the suit land from the Government in Settlement Case Number 93F of 1939-40 and since then he remained in possession of the land on payment of rent. The suit land was correctly recorded in the name of defendant No.11 in Jamabandi Khatian and, also, subsequently in Revisional Settlement Khatian No. 191 corresponding to State Acquisition Khatian No.299. The defendant No.11, subsequently, transferred the suit land in favour of the plaintiffs by way of four registered sale deeds dated 25-1-79 and since then they are in possession of the suit land with homestead and living therein with their families. The defendant No.1 created a forged Nadabi Muktipatra Deed dated 3-5-1940 and on the basis of the said deed fraudulently obtained an *ex parte* decree on 4-4-1960 on institution of a suit being Title Suit No. 30 of 1960 in the Court of First Munsif at Bhola. The defendant No. 11 challenged the said ex parte decree by filing a suit being Title Suit No.212 of 1979. The defendant No.11 having been subsequently, gained over by the defendant No.1 relinquished his right, title, interest and possession by way of a Solenama dated 17-12-1979 and the said suit was dismissed in terms of the said Solenama. The plaintiffs were added as defendants in the said suit by way of an application under the provision of Order 1, rule 10 of the Code of Civil Procedure but subsequently their names had been struck off. The defendant No.1 transferred the suit land in favour of his two sons, the defendant No.2 and Shamsuddin, the predecessor of defendant Nos.3-9.

4. The defendant Nos.1-9 contested the suit by presenting a written statement contending, inter alia, that the suit as framed is not maintainable and the same is barred by limitation. It is stated that the defendant No.1 took settlement of the suit land from the Government in the Benami of defendant No.11 who admitting defendant No.1 as the true owner executed a Nadabi Muktipatra in his favour on 3-5-1940. The suit land having been wrongly recorded in the name of the defendant No.11, the defendant No.1 instituted a suit being Title Suit No.30 of 1960 against the defendant No.11 for declaration of his title on the suit land. The said suit was decreed on 4-4-1960 against the defendant No.11, the defendant No.1 and thereafter the defendant Nos.2-9 remained in possession of the suit land on mutating their names in the connected Record of Right and also by payments of rents to the Government. It is also pleaded that the plaintiff No.1 was an employee (কর্মচারী) under the defendant No.1 and he used to reside in a dwelling hut erected by defendant No.1 in a portion of the suit land and plaintiff No.1 used to look after the land and also pay rent with respect to the suit land and other lands for and on behalf of the defendant No.1 It is also averred that the plaintiff No.1 was dismissed from his service by the defendant No.1 and he bore grudge against defendant No.1 which prompted him to obtain some deeds in his own name and also in the name of other persons in collusion with defendant No.11. It is asserted that Title Suit No.212 of 1979 was filed by the defendant No.11 at the instance of the plaintiffs. Good sense, thereafter, prevailed upon the defendant No.11 who ultimately filed a Solenama in the said suit admitting the right, title, interest and possession of the defendant No.1 and the said suit was dismissed in terms of the Solenama.

5. The pleadings of the parties gave rise to the following issues :

1. Is the suit maintainable in its present form?

2. Is the suit barred by limitation?

3. Is the suit properly valued and sufficiently stamped?

4. Have the plaintiffs right, title and interest on the suit land?

5. Are the alleged registered

Muktipatra and decrees void, fraudulent and not binding against the plaintiffs?

6. Are the plaintiffs entitled to get a decree as prayed for?

7. What other reliefs, the plaintiffs are entitled to?

6. Both the parties adduced both oral and documentary evidences in support of their respective contentions/pleas.

7. Learned trial Judge held that the defendant No.11 in Title Suit No.212 of 1979 by filing solenama admitted that he was as Benamder of defendant No.1 and the contesting defendant No.1 have title to the suit land. The learned Trial judge further held that the plaintiffs are claiming interest through defendant No.11 who admitted defendant No.1's title to the suit land and the plaintiffs have no better title than their vendor and as such the plaintiffs cannot claim title to the suit land. The trial judge recorded the finding that the defendant No.11 admitted the Muktipatra and the decrees passed against him to be genuine and the plaintiffs, therefore, cannot say that the Muktipatra and the other documents and decrees are fraudulent. The learned trial judge also found that it appeared that the defendant's contention that the plaintiff No.1 was the Karmachari of defendant No.1 is true and also that the plaintiff's contention that plaintiff No.1 purchased some land from defendant No.11 and constructed dwelling hut thereon is a false story. The learned Judge on a consideration of evidences and other materials on record the fact and circumstances on record found that plaintiffs failed to prove that the plaintiff's vendor defendant No.11 ever possessed the suit land or that the plaintiff No.1 ever paid any Borga Crops to defendant No.11. The learned trial Judge ultimately held that the plaintiffs failed to prove their case of title and possession on the suit land. With the above findings, the learned trial judge dismissed the suit.

8. Being aggrieved by the aforesaid decisions of the trial judge the plaintiffs preferred an appeal before the learned District Judge, Bhola but with no better result and the same was dismissed by the learned District Judge. The learned District Judge negatived the contentions raised in the appeal on behalf of the plaintiff-appellants and concurred with the decision arrived at by the learned trial judge. The learned District Judge in agreement with the decisions arrived at by the trial judge held that as the defendant No.11 admitted that the suit land had been taken settlement by the defendant No.1 in his name and the defendant No.11 executed and registered Nadabi Muktipatra in favour of the defendant No.1 and the title of the defendant No.1 over the suit land had been declared in Title Suit No.30 of 1960 and also that the kabala deeds in favour of the plaintiffs by defendant No.11 dated 25-1-1979 had been treated as forged and without consideration, the plaintiffs are bound by the admission of their vendor, the defendant No.11. The learned District Judge also recorded the finding that on a proper analysis of the legal evidence on record, the benami settlement matter did not appear to be baseless. The learned District Judge was also of the view that the plaintiff No.1 Abdul Kader Rari was the most competent witness for the plaintiffs to assert their claim but he withheld himself from being examined in the court in support of the plaintiff's claim. The learned District Judge on an analysis of the legal evidence ultimately held that the defendants are in possession of the suit land for more than 12 years. The learned District Judge, accordingly, dismissed the appeal.

9. Feeling aggrieved by the said decision of the learned District Judge, the plaintiffs approached this Court in an application under section 115 of the Code of Civil Procedure and obtained the present Rule.

10. During the pendency of the Rule the opposite party No.1 having been dead, his

heirs were duly substituted in the case and the heirs are on record.

11. The plaintiff-petitioners are represented by the learned Advocate Mr Abdul Quayum with Mr Mokbul Hossain and Shawpan Kumar Dutta. The defendant-opposite-parties are represented by the learned Advocate Mr M Shamsul Alam, with Ms Roushan Ara Begum and Mr Mohammad Ullah.

12. Mr Abdul Quayum, the learned Advocate for the petitioners directed his efforts to assail the impugned judgment raising various contentions. The first branch of contention raised is that no admission having been made from the side of the plaintiffs, admission made by defendant No.11 with respect to the acquisition of right, title, interest and possession of the suit land by the defendant No.1 on the basis of a settlement after the defendant No.11 divested himself of the title and possession of the suit land is not binding upon the plaintiffs and both the courts below committed a substantial error in the decision that the plaintiffs are bound by the admission of their vendor, the defendant No.11. In support of the said contention reliance has been placed on a decision in the case of *Begum Khodeza Akhter vs Hajera Khatun and others* 37 DLR AD 212.

13. In repelling the said contention raised from the side of the petitioners, Mr M Shamsul Alam, the learned Advocate representing the opposite party side, on the other hand, contended that the admission made by the predecessor vendor of the plaintiffs are very much binding upon the plaintiffs. The learned Advocate referred to section 43 of the Specific Relief Act and submitted that the ex parte decree made against the defendant No.11 declaring title of the plaintiff on the suit land and the subsequent compromise decree disclaiming defendant No.11's right, title, interest and possession over the suit land and admitting defendant No.1's right, interest and possession on the suit land is binding on the plaintiff-petitioners who are the purchasers from the defendant No.11.

14. In the wake of rival contention raised from both the sides, it will be appropriate to quote sections 17 and 21 of The Evidence Act and also section 43 of The Specific Relief Act which are extracted below :

Section 17 of the Evidence Act

"17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."

Section 21 of the Evidence Act

"21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases :

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as admission".

Section 43 of the Specific Relief Act

"43. A declaration made under this

Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees".

15. A combined reading of the above two sections manifests that admission is voluntary acknowledgement made by a party or someone identified with him in legal interest and the said admission is relevant and not be proved as against the person who makes them or his representatives-in-interest. The predominant characteristic of evidence like admission consists in its binding character.

16. Section 43 of the Specific Relief Act is a consequential provision providing that a declaration made under Chapter VI of the Specific Relief Act is binding upon the parties to the suit and also persons claiming through them respectively.

17. In Title Suit No.30 of 1960 Kaiser Ahmed, defendant No.1 was the plaintiff and Idris Ahmed, defendant No.1 was defendant No.1. The suit was decreed ex parte on 4-4-1960 by which the title of the defendant No.1 Kaiser Ahmed had been declared over the suit land. It transpires from the materials on record that defendant No.11 did not take any step within a period of long 19 years for setting aside the decree passed in the said Title Suit No.30 of 1960. The defendant No.11 only on 29-3-1979 filed Title Suit No.212 of 1979 for setting aside the decree of Title Suit No.30 of 1960 after transferring the suit land by sale deeds in favour of the plaintiffs on 25-1-1979, that is, only after a period of two months and four days. In Title Suit No.212 of 1979 defendant No.11 entered into a compromise with the defendant No.1 admitting the latter's right, title and possession on the suit land. So, it appears that the decree obtained in Title Suit No.30 of 1960 was not set aside by the subsequent Tittle Suit No.212 of 1979, rather, the said decree was maintained by the defendant No.11 on entering into a compromise with the defendant No.1. Since the plaintiffs claim their title through the defendant No.11, the decree passed in Title Suit No.30 of 1960 and the subsequent compromise decree dated 17-12-1979 on the strength of the application of section 43 of the Specific Relief Act, are binding upon the present plaintiffs. Both the courts below considered this aspect of the matter and came to the finding that admission made by the defendant No.11 is also binding upon the plaintiffs. In the case of *Begum Khodeza Akhter vs Hajera Khatun and others, 37 DLR AD 212* referred to from the side of the petitioners, the principle enunciated is that "admission" is no doubt a strong evidence against its maker, but it is also open to him to adduce evidence to show that it is not in fact an "admission" but is the result of bonafide mistake of fact. It is well recognized that every judgment must be read as applicable to the particular facts proved or assumed and the generality of the expressions used must be read as qualified by the particular facts of the case and issues raised therein. The facts and circumstances of the cited case is quite distinguishable and got no manner of application in the fact and circumstances of the present case. The first branch of contention raised on behalf of the petitioners, thus, fails.

18. Turning now to the Benami character of the settlement, it appears that the settlement stands in the name of the defendant No.11. It is the case of the plaintiffs that the defendant No.11 is the real settlement holder with respect to the suit land. This plea of the plaintiffs is resisted by the defendant side raising the contention that the defendant No.1 is the real settlement holder and the defendant No.11 is just the Benamdar or the ostensible settlement holder.

19. The word "Benami" is of Persian origin made of two words "be" and "nam" meaning

"no name" that is nameless or fictitious. The nominal owner is the "Benamidar". The simple meaning of "Benami" is that a purchaser desires to buy property but does not desire to buy in his own name and therefore buys it in the name of someone else.

20. A Benami transaction has been described shortly as one in which the real owner of property allows it to appear in the name of an ostensible owner under a sort of secret trust. It is, too well known that the system of acquiring and holding of property and even of carrying on business in names other than those of the real owners, usually called the "Benami System" had been a common practice in this sub-continent even before the British Rule. After the establishment of British Rule in India "Benami Transaction" came to be noticed at least as early as the year 1778 in Mr. Justice Hyde's Notes where in a case that came up before him that year. The practice is mentioned thus :

> "In mere personal demands, such as Bengal Bonds, the courts have upon considerations determined that the action may be brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it. And the court had so far complied with the general practice in this country of using the names of other persons in mere personal demands, that is, in many cases the plaintiff had recovered on a note not in his own name but in some other name, giving evidence that the transaction was really his; such for instance that the money let was his, and that he took the bond in the name of another."

In the case of *Gopeskrist Gosain vs Gunga Persaud Gosain 6 MIA 53* the Judicial Committee of the Privy Council observed :

> "It is very much the habit in India to make purchases in the name of others, and they must be recognised, and effect given to them by courts except so far as positive enactment stand in the way and directs a contrary courts." In 1882, the practice of "Benami transaction" received legislative recognition. Section 82 of the Trusts Act gave statutory recognition to "Benami" transaction." Section 82 of the Trusts Act enshrines the fundamental proposition that a benamdar holds the property for the benefit of the real owner. But a "Benamidar" is not a trustee in the strict sense of the term. The "Benamidar" has some of the liabilities of a trustee but not all his rights.

21. The "Benami transaction" gave rise to countless litigations and witnessed evil effect on the society. The evil effect flowing from "Benami transaction" has been noticed by the law makers of Bangladesh. Subsequently, by the Land Reforms Ordinance, 1984 the concept of "Benami transaction" had been abolished. The Land Reforms Ordinance came into force on 26 January, 1984 when the same was published in the Bangladesh Gazette Extraordinary and on coming into force of the said Ordinance no one is allowed to set upon the claim of benami transaction.

22. Let me now consider whether there was any foundation for the defendant to lay claim that the settlement of the year 1940 was a benami settlement or not. It transpires from the materials on record that immediately after the settlement, the defendant No.11, the alleged settlement holder executed and registered a Nadabi Muktipatra in favour of defendant No.1 relinquishing his claim as the real settlement holder and admitting the defendant No.1 as the real settlement holder. The Nadabi Muktipatra dated 3-5-1940 is Exhibit-1. The Solenama is dated 17-12-1979. In the said Solenama the defendant No.11 described himself as a benamidar of defendant No.1 and the said Solenama was made a part of the decree in Title Suit No.212 of 1979.

23. The learned trial judge on a consideration of the evidence and materials on record came to the decision that the defendant No.11 admitted that the Muktipatra and the decrees against him are genuine and the plaintiffs, therefore, cannot say that the Muktipatra and other documents and decrees are fraudulent. The learned District Judge as the last and final court of fact on discussion and analysis of the evidences on record came to the decision that the defendant No.11 took settlement of the suit land from the Government out of the money of the defendant No.1 and also in his benami. The learned District Judge further found that the defendant No.11 executed a Nadabi Muktiparta in favour of defendant No.1 and in the Solenama filed in Title Suit No.212 of 1979, he also admitted that he took the settlement out of the fund and interest of the defendant No.1 and he is the benamdar of defendant No.1. On examination of the reasons given by both the courts below it is not possible to hold that the conclusions are "perverse" or even that those are against the weight and evidence on record. It is a case of reasonably possible factual appreciation of the entire evidence and the circumstances brought on record.

24. The learned Advocate, next addressed me raising the contention that the Benami transaction so far the Government land is concerned was devised to defraud the Government and the purpose of the Benami matter appears to be illegal and the plea of Benami must fail. The case of *Nurjahan Begum vs Mahmudur Rahman Mullick 34 DLR AD 61* had been referred to from the side of the petitioners in support of the contention raised. It is pointed out here that there is no pleading in the plaint that the Benami matter is against public policy. In the absence of any pleading to that effect, the defendant got no opportunity to meet the same. The petitioners for the first time before this court pressed into service this question. Since this question having not been pleaded in the plaint nor raised before the trial Court and also the appellate Court, this Court in exercising of power under section 115 of the Code of Civil Procedure is not at all inclined to entertain the same . In the cited case it was held that a transaction in aid of an illegal device to defraud the Government cannot be taken as a valid ground in a proceeding before a court of law. The said proposition is not an enunciation of any principle of law but a mere *Obiter Dicta*.

25. Coming now to the third branch of contention advanced on behalf of the petitioners that finding on possession had been based on misreading of the evidences and by this misreading the merit of the decision of the case had been seriously affected it transpire that the trial Court discussed and considered the evidences of the PWs and noticed the contradiction and inconsistencies of the evidences of the PWs. The trial Judge, though did not discuss the evidences of the DWs but he considered the evidences in their sum totality. The trial Court found that defendant party paid rent with respect to the suit land and the plaintiff, on the other hand, failed to prove they or their vendor defendant No.11, ever paid any rent for the suit land. The lower appellate Court being the last and final court of fact discussed the evidences of both PWs and DWs *in extenso* and on a proper analysis of the entire evidences and materials brought on record came to the positive finding that it had been established through legal evidence that the defendants are in possession over the suit land for more than 12 years. The finding of possession arrived at by the lower appellate Court on a proper discussion and consideration of the evidences has become a finding of fact. It transpires, further, from the materials on record that the defendant side filed a good number of rent receipts showing payment of rent to the Government Acquired Estate. Exhibit-A Series are those Rent Receipts. The plaintiffs, on the other hand, signally failed to file any Rent Receipt to show any payment of rent to the Government. Rent

receipts are evidence of possession and possession always follows from lawful title. The case of *Erfan Ali vs Joynal Abedin Mia and others, 35 DLR AD 216* may be noticed in this context. On a close reading of the evidences of the parties it cannot be said that the evidence on the factum of possession had been misread by the courts below. The contention raised from the side of the petitioners is devoid of any substance.

26. It is the case of the plaintiffs that the defendant No.11 exercised acts of possession through Abdul Kader Rari, the plaintiff No.1. The contention of the defendant No.1 is that, Abdul Kader Rari was a 'Karmachari' under him and he used to take care of the suit land along with other land on his behalf. It is the assertion of the defendant No.1 that he constructed a dwelling hut for his 'Karmachari' Abdul Kader Rari (Plaintiff No.1) where he stayed with his family members. It is also the assertion that the Abdul Kader Rari was subsequently dismissed by defendant No.1 and as an act of retaliation, he influenced defendant No.11 to execute some deeds in his favour with respect to the suit land. It is also the case of the plaintiffs that Abdul Kader Rari obtained sale deed from defendant No.11 and in assertion of that right, he constructed dwelling hut on the suit land. But the plaintiffs signally failed to produce any document of title evidencing construction of a dwelling hut on the suit land on the basis of a title deed. To substantiate the contention of the defendant that the plaintiff No.1 Abdul Kader Rari used to take care of the suit land along with other land on their behalf the defendant produced Rent Receipts, Exhibits-A6 to 8 showing payment of rent with respect to some land held and possessed by Kaiser Ahmed the defendant No.1 by Abdul Kader Rari. The Rent Receipts showing payment of rent by Abdul Kader Rari in the name of Kaiser Ahmed testifies the fact that Abdul Kader Rari acted as a 'Karmachari' of the defendant No.1. It is significant to notice here that Abdul Kader Rari could be the most competent person and possibly the State witness to substantiate the claim of title and possession of the plaintiffs on the suit land. Though Abdul Kader Rari figured himself as plaintiff No.1 did not examine himself in the court although, he was very much present in the court during the whole proceedings of the suit. This aspect of the matter has been duly considered by both the courts below.

27. Argument has been also pressed into service from the side of the petitioners that both the Revisional Settlement and State Acquisition Record of Right stand in the name of the defendant No.11 and the Record of Right raised a presumption as to the correctness of the entries, made in the Record of Right and also of the possession in favour of defendant No.11. No presumption is attached to the State Acquisition Record of Right. The Revisional Settlement Record of Right got a presumption under section 103 B of the Bengal Tenancy Act but that presumption is also a rebuttable one. It is worthy to note that the plaintiffs, though, alleged to have exercised act of possession on the suit land since the year 1940, not a single Rent Receipt could be filed by them evidencing payment of rent. The defendant side, on the other hand, filed a good number of Rent Receipts Exhibits-A series showing payment of rents to the Government. It had already been pointed out that Rent Receipts though cannot be said to be evidence of title but the same can be held to be evidence of possession and possession always follows from lawful title. The presumption of possession as attached to the Revisional Settlement Record of Right in the name of the defendant No.11 appears to have been successfully rebutted by the defendants.

28. It is contended on behalf of the opposite parties that the findings arrived at by the courts below are concluded by concurrent findings of facts and those findings are immune from attack in exercise of Revisional jurisdiction under section 115 of the Code of Civil Procedure.

29. It is well recognised that the findings of fact arrived at by the courts below are not liable to be disturbed by this Court in exercise of power under section 115 of the Code. This Court in exercising Revisional Jurisdiction under section 115 of the Code can only interfere if it is shown that the finding is based on gross misreading or non consideration of material evidence or it has been founded on misconception or mis-application of law or misinterpretation of any material document or otherwise it is "perverse" being contrary to the evidence on record. The findings arrived at by the courts below appear to have rested upon consideration and discussion of legal evidences and materials on record and also on a correct analysis of the legal aspects involved in the Suit. The judgments under challenge cannot be said to have been based on misreading of evidence or it has been founded on misinterpretation of laws or otherwise contrary to the weight of evidence on record. The decisions cannot be said to have been suffered from perversity. In this context the decision of the Judicial Committee of the Privy Council in the case of *Mussammat Durga Choudhurain vs Jawahir Singh Choudhuri, 17 Indian Appeal 122* may be profitably referred to. The Judicial Committee of the Privy Council as far back as in the year 1890 held as follows :

> "An erroneous finding of fact is a different thing from an error or defect in the procedure and there is no jurisdiction to entertain a second appeal on the ground of such erroneous finding, however, gross or in excusable the error may seem to be. When there is no error or defect in the procedure, the finding of the first appellate court, upon a question of fact, is final if that Court had before it evidence proper for its consideration in support of the finding."

Support for this proposition is also sought to be drawn from a series of decisions, both of our jurisdiction and foreign jurisdictions. Some decisions of our Appellate Division in the case of *Fokaruddin Mia and another vs Mohammad Khoda Baksu Sheikh, 29 DLR (SC) 268, Akrab Ali vs Zahiruddin, 30 DLR SC 81, Abdul Matin Chowdhury vs Chapala Rani Sen and others, 37 DLR (AD) 205, Naimuddin Sardar vs Md Abdul Kalam, 41 DLR (AD) 3, Jasimuddin Kanchan vs Ali Ashraf, 42 DLR (AD) 289, Mazhurul Borhan vs A H Bhuiyan, 15 BLD AD 237 and Haider-un-nessa and another vs Monwara Begum and others 16 BLD (AD) 280* may be also noticed.

30. The preponderant judicial views emerging out of the authorities referred to above are that, the finding of fact based on evidence and other materials on record cannot be disturbed by the High Court Division and the same is binding upon it.

31. In view of the discussion made herein above and after giving my anxious consideration to all pros and cons and after taking note of catena of decisions of the Apex court from time to time, I am of this considered view that the Rule is devoid of any substance and the same is liable to be discharged.

32. In the result, the Rule is discharged.

33. Having regard to the facts and circumstances of the case, the parties are directed to bear their respective costs.

The lower courts' record be sent down as expeditiously as possible.

Ed.